

## TRIBUTE TO JUDGE RICHARD A. POSNER†

I want to thank Judge Posner and Dean Revesz for asking me to contribute to this dedication. Since I am a mere practitioner, I don't know a lot of fancy words or concepts, and I have to rely on rather craven jury-pleasing gimmicks. I have worked some of those gimmicks into this tribute, and I actually thought I might start off with one. I'm sure it will be very familiar to Judge Posner for reasons I'll give you.

[Mr. Patry plays a Klezmer music recording.]

That's music from Judge Posner's Bar Mitzvah party, which was held in January 1952. In the Jewish calendar, he was born on the 13th of *Tevet* 5699, or January 11. In the synagogue that Saturday, he read—like many Bar Mitzvah boys do—the Torah portion of the ceremony. That particular Saturday, the reading was the last part of Genesis, a *parsha* called *Va'Yechi*. This name comes from the introductory words of the reading, which are “*Va'Yechi Ya'acov b'Eretz Mitzraim*”—“And Jacob lived in the land of Egypt.” This is the Bible that's not in Mel Gibson's movie, by the way. I believe that the experience of reading this passage from the Torah actually set the thirteen-year-old Dick Posner on the path of becoming the singular figure that he is today. Some of you may perhaps have read the *New Yorker* article that gives other explanations,<sup>1</sup> but mine is that this experience is what really set him on his path.

The passage that Dick read discusses Jacob's deathbed blessing upon his son Joseph's sons, Ephraim and Menasseh. Some of you may know Joseph and his amazing Technicolor dreamcoat from Andrew Lloyd Weber's musical; those of you who have read Judge Posner's *Law and Literature* will know him from the Thomas Mann novel. In any event, Jacob leans down as he's dying and starts to bless the younger, Ephraim, with his right hand, and Menasseh, the first born, with his left hand. Joseph stops his father, believing that he's making a big mistake: Jacob should have blessed his elder grandchild with his right hand, and his younger with his left. Jacob responds to Joseph, “I'm not making a mistake, I know what I'm doing. Menasseh the eldest is going to be a successful guy, but

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† This tribute is adapted from Mr. Patry's oral tribute to Judge Posner at the *Annual Survey*'s dedication ceremony. Mr. Patry's tribute included an audio re-mix of Judge Posner's remarks from the bench, which is referenced herein, but not available for listening.

1. Larissa MacFarquhar, *The Bench Burner*, THE NEW YORKER, Dec. 10, 2001, at 78.

Ephraim, the younger, is going to become a much greater guy and his offspring are going to fill the nations.”

The thirteen-year-old Dick Posner learned a number of lessons from this exchange. The first is that the Bible takes a Law-and-Economics approach to questions of succession. It does not endorse the ancient English tradition of primogeniture, because it's decidedly inefficient. After all, it eventually leads to idiot rulers like Prince Charles, who was so daft as to throw over Diana for Camilla. That's not a system that you want to imitate. Instead, the Bible takes a rather ruthlessly Darwinian approach: the son who is best able to lead prevails. In addition to that first inculcation in Law and Economics, his reading from Genesis taught Judge Posner to think outside the box—Jacob didn't do what other people had done, he did what he thought made the most sense. And of course, this type of independent thinking is the hallmark of Judge Posner's scholarly and judicial writing today.

Because I am an intellectual property lawyer, I think that I can shed some light on Judge Posner's intellect by comparing his rulings with those of other very famous judges who have specialties in intellectual property law. Judge Jon Newman on the Second Circuit uses what might be called a Talmudic approach—very close reading of the text, fastidious analysis of premises, and a rather conservative holding that's generally not too far out beyond the problem that's presented (although with intellectual delight in discussing the interesting issues). If the issue were, say, the applicability of the statutory test for fair use of copyrights under 17 U.S.C. 107,<sup>2</sup> Judge Newman, in his Talmudic approach, would analyze the four factors prescribed by Congress and any relevant precedent,

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2. This section reads as follows:

§ 107. Limitations on exclusive rights: Fair use

Notwithstanding the provisions of section 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

and would arrive at a thoughtful conclusion based on careful consideration of both.

Judge Pierre N. Leval, who joins me in giving tribute to Judge Posner, is also a great copyright scholar, but he takes what might be called a pragmatic deconstructionist approach. He pulls every problem apart in meticulous detail and then reconstructs it in rather elegant chains of logic that represent not only great thinking, but also the best practical approach to the solution. For example, he wrote a very famous article in the *Harvard Law Review* that's been cited repeatedly by the Supreme Court, lower courts and scholars, and which exemplifies the studied balance he strikes between scholarship and pragmatism.<sup>3</sup>

So what about Judge Posner? He takes what I would call the "Jacob approach." Rather than explaining that approach in my own words, I thought I would let Judge Posner make the case for himself. Following are a few words by Posner on Posner, from the *New Yorker's* infamous profile of him:

I'm not fully socialized into the legal profession. I'm like an imperfectly housebroken pet. I still have difficulty understanding, and this is something that most people get over in their first two weeks of law school, lawyers spouting things that they don't believe. If someone is obviously guilty, why do you have all this rigmarole?<sup>4</sup>

Judge Posner actually applies that philosophy consistently in copyright cases, as revealed by the following quote from a 2002 fair use opinion in which he discusses the relevance of the four statutory factors I just mentioned: "Factors (1) and (2) are empty . . . . Factor (3) is inapplicable . . . . Factor (4) at least glances at the distinctions we noted earlier."<sup>5</sup>

Having worked for Congress, and actually having revised that particular part of the statute, I would say that's not a great vote of confidence. Nevertheless, I think Judge Posner's "Jacob approach" is not only appropriate, but exciting: his independent analysis of the issues goes straight to the heart of a common law doctrine and illuminates it in ways that those of us who have had the misfortune of growing up as doctrinalists would miss. And he really has a tremendous amount to teach.

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The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

3. Pierre N. Leval, *Towards Fair Use Standard*, 103 HARV. L. REV. 1105 (1990).

4. Larissa MacFarquhar, *The Bench Burner*, THE NEW YORKER, Dec. 10, 2001, at 78.

5. *Ty, Inc. v. Publications Int'l*, 292 F.3d 512, 522 (7th Cir. 2002).

Now, I confess to being prejudiced about the particular opinion I just quoted from, because I did argue it before Judge Posner and won reversal of summary judgment. I won't discuss the merits of the case, but I can tell you something about the actual experience of arguing before Judge Posner. Those of you who have had the opportunity to talk to him know that he is unfailingly gracious, polite, and patient for the many of us who have inferior intellects. On the bench, however, he's rather a quite different animal. He's a cat, to be precise, which he will take as a compliment. He quickly and mercilessly seizes on the rather slow dullard mice that helplessly or haplessly parade before him every day.

Because the Seventh Circuit posts its oral arguments online, I have been able to extract snippets from an hour-long oral argument to provide a visceral feel for what it is like to argue in front of Judge Posner. These snippets show Judge Posner ruthlessly battering around my opposing counsel. The legal question at hand is whether the publisher of a collector's guide to a visual work can, for purposes of criticism and comment, make reproductions of that work without permission even though it is protected by copyright. Judge Posner is trying to get the lawyer to concede that there is some need for this use of the work—that the publisher is entitled to fair use. But she's resisting. As it turns out, Judge Posner was not the only cat on this particular panel of Seventh Circuit judges. Judge Ilana Rovner, who's really a rather sweet, almost grandmotherly figure, blurted out some rather ungrandmother-like criticism during the oral arguments. To heighten the effect of the recording, I've looped in that criticism, and added a hip-hop beat. That's why I call it Posnerpalooza.

Aside from Judge Posner's style, this remix shows you the benefit of not having copyright in government works: if these judges held copyright in their comments from the bench, they'd never let me do anything like this.

In closing, I want to thank Judge Posner for being Jacob and not Esau. And if any of you appear before him, give me a call.

WILLIAM PATRY  
Partner  
Thelen, Reid & Priest